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No. 533/12

Supreme Court, U.
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IN THE

SUPREME COURT

OF THE

United States

October Term, 1952

PATRICK E. IRVINE,
Defendant and Appellant,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellee.

PETITION FOR WRIT OF CERTIORARI
BRIEF IN SUPPORT OF PETITION
and
MOTION FOR LEAVE TO PROCEED ON TYPEWRITTEN RECORD

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IN THE

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OF THE

United States

October Term, 1952

PATRICK E. IRVINE,
Defendant and Appellant,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellee.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Patrick E. Irvine, hereby petitions for a Writ of Certiorari directed to the District Court of Appeal, State of California, Second Appellate District, Division Two, to review and reverse the judgment of conviction for violations of Section 337a of the Penal Code of the State of California.

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JURISDICTION

Jurisdiction arises out of Title 28, Section 2101-4, U. S. Codes and Rule 38-½ Rules of the Supreme Court of the United States.

The decision of the District Court of Appeal, Second Appellate District, State of California was rendered October 2, 1952 (R. 964); a petition for hearing was filed in the Supreme Court of the State of California and denied on October 30th, 1952 (R. 990), two justices, Justices Carter and Schauer, voting for the granting of the petition (R. 990). Thereafter the District Court of Appeal stayed the judgment to permit the filing of a Petition for Writ of Certiorari in this Court, which petition is being filed within the 90-days provided by Rule 38-½ Rules of the Supreme Court of the United States.

STATUTES INVOLVED

Title 26, Section 3285 of the Internal Revenue Code, provides as follows:

> "§3285. Tax.
>
> (a) Wagers. There shall be imposed on wagers, as defined in subsection (b), and excise tax equal to 10 per centum of the amount thereof.
>
> (b) Definitions. For the purposes of this chapter—
>
> (1) The term "wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting

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such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) and drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) Amount of wager. In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

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(e) Exclusions from tax. No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 3267.

(f) Territorial extent. The tax imposed by this subchapter shall apply only to wagers (1) accepted in the United States, or (2) placed by a person who is in the United States (A) with a person who is a citizen or resident of the United States, or (B) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States. Oct. 20, 1951, 2:07 p. m. E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529."

Title 26, Section 3287 of the Internal Revenue Code, provides as follows:

"§3287. Certain provisions made applicable.

All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the tax imposed by this subchapter. In addition to all other records required pursuant to section 2709, each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable. Oct. 20, 1951, 2:07 p. m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529."

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Section 337a, subdivisions 1, 2, 3, 4, and 5, of the Penal Code of the State of California, provides as follows: Every person,

"1. Who engages in pool-selling or book-making, with or without writing, at any time or place; or

2. Who, whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or inclosure, of any kind, or any part thereof with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, or any purported wager or wagers, or of selling pools, or purported pools, upon the result or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

3. Who, whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive, hold, or forward, in any manner whatsoever, any money, thing, or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of being staked, pledged, bet or wagered, upon the result, or purported result, of any trial, or purported trial, or

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contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

4. Who, whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result or purported result, of any lot, chance, casualty, inknown or contingent event whatsoever; or

5. Who, being the owner, lessee or occupant of any room, shed, tenement, tent, booth, building, float, vessel, place, stand, inclosure or grounds, or any part thereof, whether for gain, hire, reward, or gratuitously, or otherwise, permits the same to be used or occupied for any purpose, or in any manner prohibited by subdivisions 1, 2, 3 or 4, of this section; or . . .

Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year.

This section shall apply not only to persons who may commit any of the acts designated in subdivisions 1 to 6 inclusive of this section, as a business or occupation, but shall also apply to every person or persons who may do in a single instance any one of the acts specified in said sub-

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divisions 1 to 6 inclusive. [Added by Stats. 1909, p. 21; Am. Stats. 1911, p. 4.]"

Section 334 of the Penal Code of the State of California, provides as follows:

"§334 [Incrimination]: Witness' privilege. No person, otherwise competent as a witness, is disqualified from testifying as such concerning the offense of gaming, on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against him for any offense concerning which he testified. [Enacted 1872.]"

Section 640 of the Penal Code of the State of California, is as follows:

"§640 [Tapping or unauthorized connection with telegraph or telephone line; Interception of communications and use of information so obtained; Aiding or conspiring to tap line: Punishment.] Every person who, by means of any machine, instrument, or contrivance, or in any other manner, wilfully and fraudulently, or clandestinely taps, or makes any unauthorized connection with any telegraph or telephone wire, line, cable, or instrument under the control of any telegraph or telephone company; or who wilfully and fraudulently, or clandestinely, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any telegraph or telephone

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wire, line, or cable, or is being sent from or received at any place within the state; or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained; or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things hereinabove mentioned, is punishable as provided in section 639. [Enacted 1872; Am. Stats. 1901, p. 478 (unconstitutional); Stats. 1905, p. 691; Stats. 1915, p. 210.]"

Title 47, Section 605, as follows:

"§605. Unauthorized publication or use of communications. No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or

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publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, c. 652, §605, 48 Stat. 1103.)"

Fourteenth Amendment to the Constitution of the United States, provides as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

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or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

OPINIONS BELOW

The opinion below is found in 248 Pacific (2) 502 and is also contained on page 964 of the record, and also again on page 983 of the record.

SHORT STATEMENT OF FACTS

On November 5, 1951 Patrick E. Irvine, the petitioner, applied for and obtained a special wagering stamp from the Department of Internal Revenue, and tax division thereof, for which he paid the sum of $50.00. (R. 133). The stamp number was set forth in the information or charge against the petitioner. (R. 1). Following this procedure the state authorities employed Russell D. Mason, (R. 18), to install microphones and electronic devices on behalf of the Police Department of the City of Long Beach, and attach a recording machine thereto. The police had obtained a duplicate key for one of the doors to the premises of the appellant, at 3916 East Second Street, in Long Beach, which was the home of the appellant and his wife Mildred. They strung wires from the Irvine home on East Second Street to about 700 or 800 feet distance to a garage where they had a microphone

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and recording device installed. They entered the house secretly and without any search warrant or other process to install the microphone, and then thereafter they entered twice after that and changed the microphone, on December 8th and again on December 28th, because of interference from a flouorescent lamp which made the hearing over the recording device very difficult. (R. 135).

After the microphone had been installed, Mr. Mason together with officers Calori, Gautt, Hermansen, Kennedy and Jacobsen, were detailed to work at stated hours in the garage with the amplifier and to listen to conversations which they heard and desired to have recorded. It was discovered that Mr. Lippe, another defendant, was entering the defendant's home and that he also returned to a building in Los Alamitos, Orange County, 10851 Chestnut Street in that city, where he had two phones and various bookmaking apparatus and paraphernalia.

Through the installed listening device at Mr. Irvine's home the officers heard telephone conversations, and would hear Mr. Irvine dial the telephone and then call bets to some person on the other end of the phone, referring to that person on such occasions as "Jamoke" who it was asserted is a nickname for Mr. Lippe. On various occasions they heard Mrs. Irvine call out bets on the horse races naming the track and the horses and the amounts of bets taken, which were related in phone conversations.

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On January 5, 1952, by a prearranged plan, having learned the streets that were driven on these trips back and forth, it was agreed among the officers that Mr. Jacobsen would obtain a quantity of fluorescent powder, which is invisible ordinarily and is not visible at all unless and until subjected to an ultra-violet ray lamp. It was further agreed that they would stage a pretended road block when Pete Curti was making his trip back into Mr. Irvine's home, and as part of that plan Mr. Gautt, one of the officers who had been working on this case at the garage, was a decoy. He was to be stopped, having his automobile stopped, and searched as though someone had just committed a hold-up over in Garden Grove or that vicinity, and it was further suggested that Mr. Gautt was to get his automobile directly in front of Pete Curti's automobile so that when he was stopped the Curti automobile would be stopped directly behind him. There were motorcycle officers there to stop both persons; Mr. Gautt was compelled to get out of his car and hold up his hands and was searched, and a gun was found in the waistband of his trousers and the gun was taken and he was told to get in the car. Directly behind the car was the car of Mr. Curti and in the car with him at that time was Audie Greer. The same idea was carried out by the officers there. They were told that a hold-up had just been perpetrated and that it was a car similar to the car in which Mr. Curti was riding. Mr. Curti and Audie Greer got out of the car and there were a large number of betting markets, papers

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and other articles alleged to be betting markers partly concealed under the coat of Audie Greer, which she held in her hand and she was directed to place everything back in the car. The officers being in uniform at that time, she laid these things down on the seat of the car, and while pretending to search the car Mr. Jacobsen, with a fluorescent powder all over his hands, pawed through the papers and pretended to look for guns and touched and impregnated all of the papers with the fluorescent powder. Some of the papers were taken from the shirt pocket of Mr. Curti which were perfunctorily examined and also impregnated with fluorescent powder and given back to him, and they were permitted to go on their way.

A short time later, after they had gone to the home of Mr. Irvine, officers entered the house, placed Mr. Irvine under arrest. In his desk and about his desk, in addition to many other things, they asserted they found these same papers with the same fluorescent powder on them and they were subjected to the ultra-violet ray test in the presence of Mr.. Irvine. They also put the ultra-violet ray light upon his hands and there was fluorescence all over his hands, they asserted. These papers, it is alleged, were betting markers.

The appellant was convicted of violation of section 337(a), subdivisions 1, 2, 3 and 4 of the Penal Code of the State of California (R. 110, 111, 112, 113) as alleged in Counts II, III, IV and V of the Information (R. 1 to 4).

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Early in the trial, in the trial court in the Superior Court for the State of California in and for the County of Los Angeles, at Long Beach, California, where the case was tried, the appellant raised the point that he could not be prosecuted because he had already obtained a stamp from the federal government and that the State therefore had no right to prosecute him. (R. 242-247). The appellant also raised the point that installation of the microphone in his home, without any search warrant or other process and thereafter recording telephone conversations constituted a violation of his constitutional rights under the Fourteenth Amendment to the Constitution of the United States, in that the evidence was illegally obtained in violation of due process of law and also consisted of recordings of telephone conversations without the consent of either the receiver or the sender of the conversations. That these violated his rights under the federal constitution. (R. 244-247).

There was a standing objection throughout the trial based upon these contentions and although frequently the objections were repeated, the court overruled all objections and permitted the objection to go to all the proceedings. (R. 247).

It was also pointed out and made a part of the objection that wire tapping in the State of California is forbidden by Section 640 of the Penal Code and therefore the use of such wire tapping evidence constituted a violation of due process of law guaranteed by the Fourteenth Amendment.

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Following the overruling of the objections, the court permitted conversations had over the wire recorded and heard over the telephone to be received in evidence against the appellant. (R. 249, et seq). Thus telephone conversations which were heard over the installed wire recording are listed on page 363 of the Record:

> "A. I heard the sound a a 'phone being dialed. I heard Mr. Irvine's voice.
>
> Q. Very well.
>
> A. I heard Mr. Irvine says 'Can I speak to Jamoke'? Then I heard Mr. Irvine say, 'In the first place you've got the horse down wrong.' Then I heard him say, 'In the 8th, 2 to win.' Then I heard him say 'King's Boy, 2 to win. In the fourth, Handy Display. In the fifth, Limbo Junior, 2 to win. I've got some more for you. In the third, Clam Digger.' And I heard him say the word 'Fair Grounds.' And that is all of that particular conversation I recall at this time." (R. 363).

On December 11th he again recorded a phone conversation. (R. 364):

> "I heard the sound of a 'phone being dialed and I heard Mr. Irvine say, How you doing, Tony?' Then there was a pause. Then I heard Mr. Irvine's voice says, 'Here's a parlay, 1-7, 2 across.' And '47-58-68-73-84-57-65-83.' Then '16-51-1-across parlay."

Other conversations are recorded on pages 365, 366 and 367, 384. The conversation of December 29th:

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"I heard Mr. Irvine—I heard a phone being dialed. I heard Mr. Irvine say, 'How're you doing, Pete?' I heard him say, 'Tropical, 37, 64, 9.11, 96, one and one criss-cross. Whitman, one to place, criss-cross.' Then I heard him says, 'You made a mistake on Nelson. You paid him 7.20 for the $5 he bet and that 7.20 was payment for only $2.' " (R. 384).

Oher conversations are recorded on page 385, 386 and 387.

On December 2nd, the police took a key-man to the home of Mr. Irvine to have a skeleton key made of the premises. (R. 642). They gave him nothing to guide him, just asked him to make a key and he pushed into the lock to locate the tumblers and then filed the key until it opened the lock. (R. 643). He made the key on the front porch of Irvine's home, but without Irvine's consent. (R. 643). The officers, Inspector Kennedy and Officer Hermansen, got the key the following day. (R. 644). They walked into the house through the key they stealthily got, looked around at papers and things. (R. 646, 647). They examined the papers in the house under fluorescent light. (R. 649). They demanded Irvine to come over and put his hands under the light; he walked over and put his hands underneath the ultra violet light. (R. 650, 651). There was a reaction on his hands when he put them underneath the light. There was a search made of the house (without any search warrant or any other process by the officers). (R. 653). In the house they found the

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government issued waggering stamp belonging to Morris Lippe. (R. 654). In the bedroom they saw a racing form and 46-sheets of paper and a little note book. (R. 655). In Mr. Irvine's room there was a book with a list of telephone numbers. They took pictures of the bedroom and pictures of the place. They searched the place and picked up books, papers and paraphernalia and several things which were introduced into evidence as Exhibits 22 et seq.

The microphone in the petitioner's house was removed on January 5th. (R. 667). The wagering stamp was found in a drawer of Irvine's home. (R. 668).

Frederick L. Good, a police officer of the City of Long Beach testified that on the night of January 5th, he took a special tax stamp, wagering, bearing the name apparently in typewriting "Irvine, Patrick E." and the address 3916 East Second Street, Long Beach, California, wager 28506, November '51 and then bearing a date, 11/5/51, which was marked as People's Exhibit 36. (R. 690). He said he took it from the wallet of the defendant, Patrick Irvine in the city jail on the night of January 5. (R. 690). There was also on the stamp tax the sum of $50.00. There was an objection to the introduction of the stamp in evidence because it was obtained in compliance with the federal law and therefore could not constitute an illegal act and can't be used to prove an illegal act of the state. (R. 691-692). This objection was overruled. (R. 692).

There was also introduced in evidence over objection the photostat of an original application, dated

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October 31, 1951, of Patrick E. Irvine to the Head of the Wage and Excise Tax Division of the United States Government, which constituted an application and report in a government report issued by the government regarding the application. (R. 854). The objection was overruled. (R. 855).

The court permitted in evidence all of the exhibits 63 to 74 from the records of the Office of the Collector of Internal Revenue. (R. 864). Exhibit 63 is the application of Patrick E. Irvine, the petitioner herein.

Objection to the installation of the microphone in the home of the appellant and the obtaining of testimony in that manner was objected to as a violation of due process of law (R. 922) and as using standards forbidden in the case of *Rochin v. People of the State of California* on motion for a new trial (R. 922) which motion was denied. (922).

The appellant was sentenced to one year in the county jail on Count II, (R. 946), six months in the county jail on Count III and the sentence to be suspended on the condition that he pay a fine of $1500.00 or to run consecutively with Count II; six months in the county jail on Count IV, suspended, and six months in the county jail on Count V, suspended. If the fine is not paid the six months is to run consecutively with the year's sentence. (R. 947).

The trial judge gave the following instructions to the jury:

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"You are instructed that you are to consider all evidence which the Court has permitted to be introduced for your consideration, irrespective of the manner by which such evidence has been obtained, and to give to all of such evidence the weight to which you shall find it to be entitled.

The above instruction refers specifically to the testimony tending to prove that a microphone was placed in the home of defendant Patrick E. Irvine without the knowledge or consent of either the said Patrick E. Irvine or his wife, Mildred Irvine, and then connected by a wire to a distant point where it has been testified a recording machine and a loud speaker were installed and voices originating in the home of defendant Irvine were allegedly heard over the loud speaker and recorded on the recording machine. Such evidence (if you find that it was so obtained) is legally admissible in this State the same as any other competent evidence." (R. 42).

"You are instructed that any trespass which you may find to have been committed upon the property of the defendants, or any of them, is not to enter into your deliberations in weighing the guilt or innocence of these defendants or to be considered by you in any manner whatsoever. That is a matter in which defendants have a separate remedy at law but which has no part in this trial. It is your duty to consider only the evidence which has been admitted for your consideration and determine from such evidence whether the guilt of defendants, or any of them, has been proved, and render your verdict accordingly." (R. 35).

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"You are instructed that, effective November 1, 1951, Federal Laws require that every person who engages in the business of accepting wagers on horses or on any other sporting event, is required to make application to the Collector of Internal Revenue for a wagering stamp, which stamp must at all times be kept at the place of business of such person, or if he have no place of business, carried at all times on his person. Such person shall make monthly reports to the Collector of Internal Revenue showing the business he has done for the previous month and pay a tax on such amount, less any credit for so-called "lay off" bets, that is, as defined by Federal law, bets received from another person engaged in accepting bets who has paid or reported such "laid off" amounts himself.

Such Federal laws also provide that an individual may be primarily engaged in business as a salesman or merchant, for example, and if in addition to such regular business he accepts bets for profit, he shall be deemed to be engaged in the business of accepting wagers. Whether a person accepts bets for himself alone or for others, he is required to purchase the wagering stamp and pay the tax imposed.

However, none of the defendants is here being charged with violation of any Federal laws, but only for the specific crimes described and charged in the information filed by the District Attorney.

You are further instructed that the payment of any tax imposed by the Internal Revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punish-

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ment provided by the laws of this State for carrying on the same within this State or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of this State. The special tax stamp is not a license or permit and affords no protection from prosecution for violation of any Federal or State Law." (R. 72, 73).

The appellant appealed to the District Court of Appeal for the State of California, Second Appellate Department, Division Two, which sustained the judgment of the trial court as against the contention that the rights of the petitioner under the Constitution of the United States had been violated and held that he had not been denied rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. (R. 968, 969).

The petition for hearing in the Supreme Court of the State of California was denied on October 30th, 1952, in which the rights under the Federal Constitution were again reasserted, (R. 979, 980, 981), and the Supreme Court of California denied the hearing, two justices however were of the opinion that the petition for hearing should be granted—Justices Carter and Schauer. (R. 990).

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QUESTIONS PRESENTED BY THIS PETITION

I.

Whether the Wagering Stamp Tax provided for by an Act of Congress may be nullified and defeated by state officers arresting a person so taxed and thus licensed.

II.

Whether a State may take advantage of the fact that the Federal Government taxes a person on the presumption that the tax is upon a lawful occupation to use that fact as compelled evidence against a person under a state law and thus convict him of a state crime on the basis of evidence which he has been compelled to give by reason of a Federal Statute; and whether conviction based upon such evidence violates the due process clause of the Fourteenth Amendment to the Constitution of the United States

III.

Whether the method used by the police in this case of secretly having a locksmith make a key to appellant's home and thereafter entering it and installing a microphone and thereafter installing listening devices and obtaining evidence of telephonic and other conversations in the home violate those fair and fundamental standards of justice consonent with due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

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IV.

Whether a fair trial has been had in this case where evidence obtained by compulsion of a Federal Statute and obtained by burglary into appellant's home and in violation of fundamental rights constitutes a fair trial within the meaning of the Fourteenth Amendment to the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

This case involves fundamental questions of constitutional law which have not been, but should be, passed upon by this Honorable Court under the facts involved in this case: namely:

(1) Whether a State may through its criminal laws defeat and extinguish a federal tax passed by Congress and the opportunity to continue collecting such tax?

(2) Whether an Act of Congress imposing a tax upon wagering constitutes a license to wager which cannot be impaired by State law?

(3) Whether a defendant may be tried and convicted in the State courts upon evidence obtained by compulsion of a Federal Statute, and thereafter introduced in evidence against an accused in the State court?

(4) Whether compelled evidence under the Federal Statute within the meaning of the Fifth Amendment to the Constitution of the United States may be used in a state court without violating the Fourteenth Amendment to the Constitution of the United States?

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(5) Whether evidence obtained by burglarious entry of the police into the home of the appellant and by listening devices thereafter installed and recordings of telephone conversations through those listening devices and used in the trial of the appellant against him constitute such uncivilized standards as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States?

(6) Whether under the facts and circumstances of this case the appellant has been deprived of a fair trial guaranteed by the Fourteenth Amendment to the Constitution of the United States?

Each of these questions is fundamental. The District Court of Appeal of the State of California, Second Appellate District, has denied that the appellant's rights under the Fourteenth Amendment to the Constitution of the United States were violated and the Supreme Court of California has denied a hearing—two justices voting for the granting of the hearing.

It is respectfully submitted that the Writ should be granted by this Honorable Court and the judgments of the courts below reversed.

WHEREFORE, your petitioner prays for the granting of the Writ and the reversal of the judgments below.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. .....

PATRICK E. IRVINE,
Defendant and Appellant,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellee.

BRIEF IN SUPPORT OF PETITION

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner adopts by reference the Jurisdictional Statements, the Statutes Involved, Opinions Below and the Statement of Facts Contained in the Petition for Writ of Certiorari as though fully set out and repeated here again.

QUESTIONS PRESENTED

I.

Whether the Wagering Stamp Tax provided for by an Act of Congress may be nullified and defeated by state officers arresting a person so taxed and thus licensed.

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II.

Whether a State may take advantage of the fact that the Federal Government taxes a person on the presumption that the tax is upon a lawful occupation to use that fact as compelled evidence against a person under a state law and thus convict him of a state crime on the basis of evidence which he has been compelled to give by reason of a Federal Statute; and whether conviction based upon such evidence violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

III.

Whether the method used by the police in this case of secretly having a locksmith make a key to appellant's home and thereafter entering it and installing a microphone and thereafter installing listening devices and obtaining evidence of telephonic and other conversations in the home violate those fair and fundamental standards of justice consonent with due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

IV.

Whether a fair trial has been had in this case where evidence obtained by compulsion of a Federal Statute and obtained by burglary into appellant's home and in violation of fundamental rights constitutes a fair trial within the meaning of the Fourteenth Amendment to the Constitution of the United States.

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REASONS FOR GRANTING THE WRIT

1. That an important question of federal law has been decided by the State of California contrary to decisions of this court, and involve important questions of the administration of criminal justice which have not been but should be decided by this Honorable Court.

2. Title 26, Section 3285, and 3287, the Wagering Tax Law, was adopted by Congress and the right of a state to interfere and defeat it have not been, but should be, settled by this Honorable Court, in accordance with principles that a state cannot restrict the National Government's operations within its sphere; where the police powers of a state interfere with the national tax, the state must give way.

3. Important questions of criminal law under the Fifth and Fourteenth Amendments to the Constitution of the United States are raised by this case, to-wit, whether evidence obtained by burglarious conduct of police officers, trickery, and recording of telephone conversations in one's home, so far offend the fundamental principles of justice which inhere in our institutions as to receive the disapproval of this Court under the Fifth and Fourteenth Amendments to the Constitution of the United States.

4. Whether wire-tapping forbidden by the laws of the state wherein it occurs shall be read jointly with Title 47, Section 605, U. S. Codes, the Federal Communications Act so as to make that act equally appli-

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cable in a state where a similar law exists and should result in the exclusion of evidence so obtained, thus distinguishing the case from *Schwartz v. Texas,* decided December 16, 1952.

SUMMARY OF THE ARGUMENT

I.

Congress had a constitutional right to fix the wagering tax toward paying for the national debt. When Congress, by Title 26, Section 3265-3267 (65 Stat. 529), passed the act fixing a tax upon wagering throughout the United States the state could not interfere with or interrupt the federal tax by arresting the purchaser and terminating his use of the stamp.. The person upon obtaining such a stamp and paying the tax was entitled to carry on wagering without interference from state authorities. A state may not interfere with a federally imposed tax by molesting and arresting the person paying such tax and thereby defeating the tax and its future collections. If it could do it in this case it could do it in any case.

Congress in fixing such a tax did so upon the theory that it was imposing a tax upon a legal operation—not an illegal operation.

II.

Where all persons engaged in the business of wagering are compelled by a law to make a declaration thereof and pay the tax and can be convicted upon

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the basis of evidence obtained by such compulsion under federal statutes, the use of such evidence in a state court constitutes a violation of due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

III.

The secret making of a key to appellant's home and burglarious entry into the home and installation of sound and recording devices and the taking of testimony heard over such apparatus, including telephonic conversations, without the consent of the receiver or the sender and in violation of Section 640 of the California Penal Code and Article I, Section 19 of the California Constitution constitutes the obtaining of evidence by standards contrary to the fundamental principles of justice that inhere in our institutions. It represents a new low in law enforcement which the courts must reject. The use of such evidence requires a reversal of the judgments below.

IV.

The use of evidence obtained by methods used by the police in this case and the prosecutor, using illegally obtained and compelled evidence, violates "fair trial" guaranteed by the Fourteenth Amendment to the Constitution of the United States.

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ARGUMENT

I.

CONGRESS HAD A CONSTITUTIONAL RIGHT TO IMPOSE THE WAGERING TAX, ARTICLE I, SECTION 8, U. S. CONSTITUTION. McCRAY v. U. S., 195 U. S. 27. WHEN CONGRESS, BY TITLE 26, SECTION 3285, 3287, PASSED AN ACT FIXING A TAX UPON WAGERING THROUGHOUT THE UNITED STATES, THE PERSON UPON OBTAINING SUCH A STAMP AND PAYING THE TAX WAS ENTITLED TO CARRY ON WAGERING WITHOUT INTERFERENCE FROM STATE AUTHORITIES. A STATE MAY NOT INTERFERE WITH OR DEFEAT A FEDERALLY IMPOSED TAX BY MOLESTING AND ARRESTING THE PERSON PAYING SUCH TAX AND THEREBY DEFEATING THE TAX AND ITS FUTURE COLLECTIONS. CONGRESS IN FIXING SUCH A TAX DID SO UPON THE THEORY THAT IT WAS IMPOSING A TAX UPON A LEGAL OPERATION—NOT AN ILLEGAL OPERATION.

On October 20th, 1951 the federal law regarding wagering stamps went into effect. On November 5th, the appellant pursuant to the commands of congress applied for and obtained such a wagering stamp. Had he failed to do so, he would have been guilty of a federal crime.

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It must be presumed that Congress intended to tax a lawful operation, and that it did so to collect money to pay the national debt.

Article I, Section 8, of the Constitution of the United States expressly confers on Congress the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."

These purposes are very broad. The motive or purpose of Congress in levying the tax may not be inquired into by the courts.

> *McCray v. United States,* 195 U. S. 27, 49 L. Ed. 78, 1 Am. Cas. 561.

Having power to raise money to pay the debts of the United States, it of course follows that Congress has power to tax and make lawful operations that might even be deemed unlawful within the States. Since the rights are created for federal purposes a state may not through any of its agencies impair the federal tax. The United States has priority of the necessary consequence of the supremacy of the Laws of the United States on all subject to which the legislative power of Congress extends.

> *United States v. Fisher,* 2 Cranch. 358, 2 U. S. (L. Ed.) 304;
> *U. S. v. Darby,* 312 U. S. 100;
> *Opp Cotton Mill, Inc. v. Administrator,* 312 U. S. 144.

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No state may as an exercise of its own power lay any burden on the taxing power or impede the taxes imposed by the United States. *(Dobbin v. Erie County,* 16 Fed. 435, 10 U. S. (L. Ed.) 1022).

And see *McCulloch v. Maryland,* 4 Wheat. 316, 5 U. S. (L. Ed.) 579; *Williams v. Callacega,* 57 U. S. (L. Ed.) 275; *Farmers, etc. Savings Bank v. Minnesota,* 232 U. S. 516, 58 L. Ed. 706; *Choctaw etc. Railroad Co. v. Harrison,* 235 U. S. 292, 59 L. Ed. 234.

The framers of the Constitution did not design to make the federal government dependent upon the states.

> *McCulloch v. Maryland,* 4 Wheat. 316, 5 U. S. (L. Ed.) 579.

Nor are states allowed to defeat federally imposed taxes.

Exclusive jurisdiction is given to the federal government in this matter.

> *Yates v. Jones National Bank,* 206 U. S. 158, 51 L. Ed. 1002;
> *Easten v. Iowa,* 188 U. S. 220, 47 L. Ed. 452;
> *Cross v. North Carolina,* 132 U. S. 131, 33 L.Ed. 287;
> *In re Eno,* 54 Fed. 669;
> *U. S. v. Busbee,* 38 Fed. 99.

The priority given the United States cannot be impaired or superseded by state law. *U. S. v. Oklahoma,*

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261 U. S. 253, 260; *Illinois v. Campbell,* 329 U. S. 362, 370, 91 L. Ed. 355.

It is well settled in the case of banks that the power of Congress subjects these national banks to the paramount authority of the United States. That an attempt by a state to define their duties or control the conduct of their affair is absolutely void, and the only power of the states in respect thereto is only when it is specifically granted by Congress.

Owensborough National Bank v. Owensborough, 173 U. S. 664, 43 L. Ed. 850.
Veazie Bank v. Fenno, 8 Wall. 533, 19 U. S. (L. Ed.) 482;
Farmers Etc. Nat'l Bank v. Erie, 91 U. S. 29, 23 L. Ed. 196.

Once Congress has assumed to tax "wagering", nationally under its Constitutional power, a State may not interfere to diminish or defeat the tax without specific consent of Congress, which has not been given. There is no difference between this situation and federal taxation and jurisdiction regarding federal banks.

One who complies with the Federal Statute and obtains his wagering stamp may thereafter not be interfered with by the state authorities because it would thereafter defeat and impair the tax. Action by a state in the exercise of its police powers must, by virtue of the supremacy clause, Article VI, Clause 2, U. S. Constitution, give way to the act of Congress. *Brod-*

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erick v. Rosner, 294 U. S. 629; 79 L. Ed. 1100; *Morris v. Jones,* 329 U. S. 553; 91 L. Ed. 497.

The power of the state "may not so deal with matters left to its control as to stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'." *Hill v. Florida,* 325 U. S. 538, 542; 89 L. Ed. 1782, 1785; *Maurer v. Hamilton,* 309 U. S. 598; *Bethlehem Steel Co. v. N. Y. Labor Rel. Bd.,* 330 U. S. 773; 91 L. Ed. 1245-6; and see *Feldman v. U. S.,* 322 U. S. 490-3.

II.

WHERE ALL PERSONS ENGAGED IN THE BUSINESS OF WAGERING ARE COMPELLED BY A LAW TO MAKE A DECLARATION THEREOF AND PAY THE TAX AND CAN BE CONVICTED UPON THE BASIS OF EVIDENCE OBTAINED BY SUCH COMPULSION UNDER FEDERAL STATUTES, THE USE OF SUCH EVIDENCE IN A STATE COURT CONSTITUTES A VIOLATION OF DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The federal statute regarding "wagering tax and stamps" was compulsory. The appellant was compelled to apply or subjected himself to prosecution conviction and imprisonment by a federal court, Sec. 3287, Title 26, upon failure to do so. His application for

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the tax stamp (Exhibit 63) and the stamp which the government issued to him by reason of such compulsion could not thereafter legally be used in evidence against him in a state court. *Brown v. Walker,* 161 U. S. 591; 40 L.Ed. 819[1]; *Jack v. Kansas,* 199 U.S. 372; 50 L.Ed. 234; *Feldman v. U. S.,* 322 U. S. 487.

In *Feldman v. United States,* 322 U. S. 487; 88 L. Ed. 1408, this court held that a state statute compelling testimony in a bankruptcy proceeding, that if the statute had been a federal statute that the testimony could not be used. Here we have the reverse situation. The state used evidence which the government compelled. We have a federal statute which makes compulsory the application for a stamp and the issuance of a stamp under penalty of imprisonment. The use of such compelled testimony in the state court thereafter violated petitioner's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. It is offensive to the common and fundamental ideas of fairness and right. *Betts v. Brady,* 316 U. S. 455, 462; *Feldman v. U. S.,* 322 U. S. 487; *Boyd v. U. S.,* 116 U. S. 616.

Section 334 of the Penal Code of the State of California provides as follows:

> "No person, otherwise competent as a witness, is disqualified from testifying as such concerning

[1]In *Brown v. Walker,* the Supreme Court thought the likelihood that State prosecutors would use testimony compelled by the Federal Government so "improbable that no reasonable man would suffer it to influence his conduct." 161 U. S. 606-608.

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> the offense of gaming, on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against him for any offense concerning which he testified."

The instant testimony was obtained from the defendant himself by a federal agency; in the strict sense of the word the documents were "testimony" which the appellant gave to a federal agency under the compulsion of the federal statute. If used thereafter in the state court, it would seem that it either violated due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States or immunity attached under Section 334 of the Penal Code of the State of California, and the judgment herein is void.

In *Boyd v. United States,* 116 U. S. 616, this court condemns the use of evidence unlawfully seized and testimony compelled against an accused as violating those fundamental standards of liberty and justice that inhere in our institutions.

> *Feldman v. U. S.,* 322 U. S. 487;
> *Hebert v. Louisiana,* 272 U. S. 312;
> *Lisenba v. California,* 314 U. S. 219, 86 L. Ed. 166;
> *Malinski v. N. Y.,* 324 U. S. 401;
> *Rochin v. California,* 342 U. S. 165;
> *Harris v. U. S.,* 331 U. S. 158.

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III.

THE SECRET OF MAKING OF A KEY TO APPELLANT'S HOME AND BURGLARIOUS ENTRY INTO THE HOME AND INSTALLATION OF SOUND AND RECORDING DEVICES AND THE TAKING OF TESTIMONY HEARD OVER SUCH APPARATUS, INCLUDING TELEPHONIC CONVERSATIONS, WITHOUT THE CONSENT OF THE RECEIVER OR THE SENDER CONSTITUTES THE OBTAINING OF EVIDENCE BY STANDARDS CONTRARY TO THE FUNDAMENTAL PRINCIPLES OF JUSTICE THAT INHERE IN OUR INSTITUTIONS. THE COURTS MUST PRESERVE THEIR OWN PURITY BY EXCLUDING SUCH EVIDENCE. THE USE OF SUCH EVIDENCE REQUIRES THE REVERSAL OF THE JUDGMENTS BELOW.

The agents of the state secretly made a key to appellant's house; they burglariously entered the home to conduct an operation in violation of California law penalizing wire tapping. Sec. 640 Penal Code of California.) The use of such evidence obtained by these methods is so shocking as to violate the fundamental principles of justice that inhere in our institutions.

Rochin v. California, 342 U. S. 165;
Betts v. Brady, 316 U. S. 455, 462, 473; 86 L. Ed. 1595, 1601, 1607;
Brown v. Walker, 161 U. S. 591; 40 L. Ed. 819;
Boyd v. U. S., 116 U. S. 616;

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Byars v. U. S., 273 U. S. 28;
McNabb v. U. S., 318 U. S. 332; 87 L. Ed. 819;
Feldman v. U. S., 322 U. S. 487.

IV.

THE USE OF EVIDENCE OBTAINED BY METHODS USED BY THE POLICE IN THIS CASE AND THE PROSECUTOR, USING ILLEGALLY OBTAINED AND COMPELLED EVIDENCE, VIOLATES "FAIR TRIAL" GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The use of evidence obtained by interception and listening to telephone conversations in one's private home violates due process of law guaranteed by the Fourteenth Amendment. We are not unmindful of the decision cited by the District Court of Appeals of the State of California, to-wit, *Wolf v. Colorado,* and also the decision of this court in *Schwartz v. Texas,* decided December 16, 1952.

Since this case, however, approaches more nearly the case of *Rochin v. California,* the question involved here is "how low can the police get in their administration of justice."

In *Rochin v. California, supra,* the officers pumped the stomach of the accused. In this case they burglarized his house. They had a man make a key to the house surreptitiously while the owner was away. Then

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they entered the house for the purpose of violating Section 640 of the Penal Code of the State of California, to-wit, tapping phones and telegraph wires. They faked an arrest and then they spread powder upon the documents and books and papers of another man. Then they broke into the house without any warrant and compelled the appellant and defendant to exhibit his hands to them.

To permit the use of this kind of evidence is to condone burglary and other lawless tactics and "dirty business" on the part of the officers, see *On Lee v. U. S.*, L. ed. Adv. 770 and *Schwartz v. Texas 21*, L. W. 4055.

In *Sorrells v. United States*, 287 U. S. 435, this court said: "The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is a province of the court and the court alone to protect itself and the government from the prostitution of the criminal law."

And, in *Olmstead v. United States*, 277 U. S. 438, 484, Justice Brandeis said, "Our government is the potent, the omnipresent, teacher, for good or for ill, it teaches the whole people by its example." Are we then going to permit such lawless practices to receive the approval of the Supreme Court of the United States, or is this court going to hold that due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States forbids such practices as this?

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Chambers v. Florida, 309 U. S. 227;
Rochin v. California, 342 U. S. 165;
Sorrells v. United States, 287 U. S. 435.

To paraphrase the language of this court in *Rochin v. California, supra,*

> The "conduct (in this case burglary and other misconduct) . . . the judgment before us would be to afford burglary and other lawless conduct of the officers of the law the cloak of law. Nothing would be more calculated to discredit law and thereby to utilize the temper of a society." (342 U. S. 165.)

Such conduct on the part of the officers is "so offensive to human dignity in securing evidence from a suspect as is revealed by this record" as to be forbidden by the Fourteenth Amendment to the Constitution of the United States and its use ostracized.

WHEREFORE, appellant prays that a Writ of Certiorari issue out of this Court to the District Court of Appeal of the State of California, Second Appellate District, Division Two, and that the judgments below be reversed.

Respectfully submitted

Morris Lavine

Wire tapping in obtaining information over the telephone is a felony under the state laws of the State of California. (Sec. 640 Penal Code, State of California.)

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. .....

PATRICK E. IRVINE,
Defendant and Appellant,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellee.

COMES NOW Patrick E. Irvine, a citizen of the United States, and moves this Honorable Court for leave to proceed upon the typewritten record on his petition and consideration of a Writ of Certiorari, for the following reasons:

1. That the record is quite long, consisting of 995 pages, and the costs of printing the record to this appellant would therefore be so great as to be prohibitive of his right to a hearing on a writ of certiorari. He has raised several important federal questions which have not been, but should be, determined by this Honorable Court.

2. The plain facts upon which the petition is based are undisputed, namely that the petitioner had taken out a federal wagering stamp on an application for

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federal stamp tax, pursuant to the act of the 82nd Congress adding Section 3285,-3287 to Title 26, U. S. Codes, and that the State has by this arrest sought to defeat and impede the tax.

3. Three police officers of the City of Long Beach surreptitiously had a key made to the appellant's home, entered the home without his consent, installed listening devices within it, and thereafter recorded several telephone conversations in violation of Section 640 of the Penal Code of the State of California, and Section 605 of Title 47, U. S. Codes. That they surreptitiously spread powder upon books and papers and thereafter required the petitioner to exhibit his person (in his home) for the purpose of obtaining evidence used in the trial of the case to convict him.

4. The appellant throughout the trial raised the federal questions involved herein which are important to be settled in the administration of justice.

WHEREFORE, petitioner prays that he be allowed to proceed upon the typewritten record upon appeal on the Petition for Certiorari.

Morris Lavine
Attorney for Petitioner.

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